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Supreme Court, U.S.
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No. 04-1143

IN THE

Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM AND MASONRY INSTITUTE BRICKLAYERS LOCAL 21 PENSION FUND

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Petitioner in its Writ of Certiorari seeks review not only because of a conflict with the Second Circuit's Decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert denied*, 89 S. Ct. 1193 (March 24, 1969) but also because of the general importance of the issues presented by the Petition.

Section 302(c)(5)(B) contained in Appendix C of the Petition 29 U.S.C. § 186 subpart (c), "the exceptions only permits payments to be received by or made to a jointly administered labor management trust fund . . . where . . . (B) the detailed basis on . . . such payments are to be made is specified in a written agreement with the employer." (App 38a).

The kind of written agreement, contrary to the holding of the Magistrate Judge in the instant case, as affirmed by the Seventh Circuit may not be the generic area labor agreement which has not exclusively been made for the benefit of the employees of Petitioner Banner. That requirement is spelled out in 29 U.S.C. § 186; § 302(c)(5):

> (5) With respect to money or other thing of value paid to a trust fund established by such representative *for the sole and exclusive benefit of the employees of such employer*.

(App 37a) (emphasis added).

Thus without regard to the language in *Moglia* which also makes clear that absent a written agreement with the employer of the employees involved in the case the receipt of such funds must be returned.

The general concern of Congress in this Statute is clear. Monies may only be accepted by a trust fund as a result of a written agreement with a labor organization for its employees. Duress in making any such payments under the Section is not permitted.

Section 302(c)(5) makes a "written agreement" a *sina qua non* and such agreement clearly must be between the employer, in this case Banner Restorations, Inc., for the exclusive benefit of his employees with the labor organization involved, in this case Bricklayers Local 21. Such written agreement clearly was never entered into though sought by the President of the Local 21, Peter Marinopoulos.[1/]

The "written agreement" requirement cannot be substituted as the Magistrate Judge has done, by simply looking to the "area agreement". This is what the Opposition looks to as well as being sufficient.

We ask the Court to accept this case for review because it presents by stark example the abuse that takes place time and again out in the field by Unions and/or Trust Funds coercing such payments absent a "written agreement".

In the fourth question presented we urge the Court to accept review without regard to the question of coercion. The coercion that occurred at the beginning of every job explains why payments were made for a 7 year period in the absence of a written agreement. In that regard in the *Moglia* case payments were made for far longer than the 7 year period, but the Second Circuit held, the payments had to be returned and could not be paid out to the beneficiary, the widow, in the absence of the "written agreement" mandated by Section 302(c).

The Magistrate Judge discredits the testimony of the 100% shareholder of Banner Restorations Co., Inc. and his son without regard to the fact that there is no testimony to the contrary, because he does not believe that the sole reason Banner made the monthly contribution to the Trust Funds was because of the coercion.[2/] While the District Court criticizes Banner for not

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[1/] Stipulation No. 20 and No. 25 (App D) (44a and 45a).

[2/] Notwithstanding Stipulation No. 23 (App 44a) an "unqualified" admission of such coercion and Stipulation No. 29 (App 46a) wherein

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having exercised its right to go to the Labor Board to protest the coercion; however, the Labor Board has been found to be a less than useful vehicle for employers in these circumstances.

In this Court's only interpretation of Section 302(c) in *Arroyo v. United States,* 359 U.S. 419 (1959), this Court announced that the policy concerns of Section 302 must be strictly enforced, because of the Court's concerns about extortion by employee representatives. 359 U.S. 419, 425-26 Coercion by employee representatives is present in this case. If the Court chooses not to reach that issue, the "written agreement" requirement still remains.

The Opposition urges the Court not to accept review by pointing out isolated instances which the Magistrate Judge relied upon to support a ratification argument not available in the absence of a "written agreement". Curiously the Magistrate Judge relies upon the failure of Banner Restorations, Inc. to comply with 3 different Arbitration Awards. Yet as pointed out in our Petition it was the Magistrate Judge who took the Respondent Trust Fund's representative to task during the trial for relying upon those very Arbitration Awards. The Magistrate Judge obtained a concession from the Respondent's Counsel that the Funds had made a mistake and that the Arbitrations were addressed to the wrong Banner Restorations (a different company). Respondent's Counsel admitted on the Record, the Funds were not pursuing the Banner/Axelrod company (mistakenly believed at the time of their Complaint to be the same as Petitioner Banner Restorations, Inc.) In fact it was the Banner/Axelrod company that had signed a written agreement and not Banner Restorations, the Petitioner herein. The detailed discussion in the Open Court colloquy which was set forth in full in footnote 6 at page 9 and 10 of the Petition herein,

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Ciancanelli (the President of Petitioner "asserts" "the payments were made . . . in response to threats . . . to shut his business down if he did not do so".

apparently was forgotten by Respondent, as it had been by the District Court in relying upon 3 Arbitration Awards that had nothing to do with Petitioner.

The other basis used by the District Court to support its credibility determination are truly isolated and unrelated. The District court references a single instance taken from the Stipulation of Fact, where Banner lent one of its trucks to the Respondent Funds, and another for making a payment for one of its employees for delinquent dues.[3/]

The argument made by Respondent, also found in the District Court's Decision and the Seventh Circuit's Decision is that in *Robbins v. Lynch*, 936 F 2d 330 (7th Cir 1988) Judge Easterbrook stated: "the threat to strike was unexceptional". This does not aid the opposition, because such threat in *Robbins* occurred in the context of a union seeking to enforce payments to an *Agreement* it already had. Quite the opposite has been held in the absence of a "written agreement". In *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773 (7th Cir. 1998) Judge Easterbrook- supported the Petitioner's position in the absence of a written Agreement stating:

> If so, the contributions made on the Lewis' behalf are unlawful for lack of a written agreement (Section 302(c)(5)(B) and must be returned and the pension credits to the Lewis' accounts cancelled.

Moriarty v. Lewis, 150 F.3d 773, 776.

[3/] We recognize that credibility determinations are rarely if ever overturned. But here the District Court limited its determination to not believing the reason for 7 years of payments was solely related to coercion. But as we urge under Question 4 – even in the absence of coercion, the "written agreement" mandate of the Statute is the question presented that raises the conflict in the Circuits that needs to be resolved and is the question of public importance.

We respectfully ask the Court to accept review on this important issue. Pension monies in the absence of a "written agreement" must be returned.

Respectfully submitted,

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